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Supreme Court of the United States.

October Term, 1932.

No. 407.

George B. Monroe, Receiver,
Petitioner,

v.

Louis Raphael,
Respondent.

BRIEF FOR PETITIONER.

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Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 407.

GEORGE B. MONROE, RECEIVER,
Petitioner,
v.
LOUIS RAPHAEL,
Respondent.

BRIEF FOR PETITIONER.

STATEMENT OF FACTS.

On July 14, 1930, a bill in equity for the appointment of a receiver for Monroe Stores, Inc. (hereinafter called The Stores), a Massachusetts corporation having an usual place of business in Massachusetts, was brought in the United States District Court for the District of Massachusetts (R. 1 and 2, par. A).

On July 23, 1930, the District Court appointed George B. Monroe of Quincy, Massachusetts, your petitioner, as receiver, and on the same day he gave bond and duly qualified (R. 2, par. D).

In compliance with an order of the District Court requiring all persons holding claims against The Stores to present their proofs therefor to the receiver for allowance on or before September 30, 1930 (R. 8, par. 3), Louis Raphael, a citizen and resident of Connecticut and the respondent herein, presented his proof of claim on September 25, 1930,

and on February 9, 1931, it was duly approved and allowed in the sum of $35,000 (R. 8, par. 4).

On November 25, 1930, one Harold F. Dempsey made an offer in writing to purchase from your petitioner, the receiver, all the assets of The Stores (R. 2 and 3, par. G, and R. 10-13). By the terms of this offer Dempsey agreed, among other things, to "pay thirty per cent of the claims of all the creditors of The Monroe Stores, Inc. in or within thirty days after their claims have been duly approved and allowed . . . said creditors shall include only those creditors who have filed their proof of claim with the Receiver pursuant to the order of this Court" (R. 10, par. 1), and "to pay any and all liabilities of the Receiver within thirty days after said claims against the Receiver have been duly allowed by this Court" (R. 11, par. 2), and to present to the District Court within seven days from the acceptance of the offer "a bond in the penal sum of $100,000.00 with good and sufficient sureties, the conditions of the bond being that if I perform the obligations of the offer said bond shall be null and void" (R. 12, par. 7). On November 26, 1930, this offer of Dempsey was duly accepted by your petitioner, the receiver, pursuant to an order of the District Court (R. 8, par. 2).

Thereafter, and pursuant to said offer, Dempsey filed a bond in the District Court (R. 8, par. 2), signed by himself as principal and Louis F. Buff and Clifford S. Drake as sureties, by the terms of which they were "bound and obliged unto the United States of America, in the full and just sum of $100,000 to the payment of which to the said United States of America, we bind ourselves," and on the condition that Dempsey "shall comply with all the conditions and items of said offer" (R. 13 and 14). Accompanying the bond were affidavits of the respective sureties, Buff and Drake, itemizing their respective assets and showing their net worth to be several hundred thousand dollars (R. 4-7). The bond and the sureties thereon were duly approved by the District Court on December 2, 1930 (R. 8, par. 2),

and the assets of The Stores were turned over to Dempsey by the receiver (R. 9, par. 6).

The amount to be paid Raphael, the respondent herein, under the terms of the offer, was $10,500 (R. 8 and 9, par. 4), but only $1200 was paid him on account of this sum (R. 9, par. 5), leaving an unpaid balance of $9300 (R. 33 and 34, par. 2). Accordingly, on March 12, 1931, more than thirty days after his claim against The Stores had been approved and allowed, Raphael "duly demanded" the payment of the amount due him (R. 8 and 9, par. 4). Thereafter, on March 23, 1931, Raphael filed a petition in the original receivership proceedings in the District Court, praying "that he may be authorized forthwith to institute and prosecute, in the name of the United States and for his benefit, an action to enforce" the obligation of Dempsey and his sureties on the bond (R. 7-9). On the same day the following order was entered by the District Court: "Petition allowed, leave to sue granted to petitioner, Louis Raphael" (R. 10).

Thereupon, on April 9, 1931, Raphael brought suit on said bond against Dempsey and his sureties in the Superior Court of the Commonwealth of Massachusetts (R. 3, par. I, and R. 34, par. 4). Said suit sought to reach and apply, under the Massachusetts statute, G.L. c. 214, sec. 3, cl. 7, certain shares of stock and other property of the defendants toward the payment of said balance of $9300 (R. 3, par. I). In this proceeding in the Massachusetts Court, Raphael obtained attachments upon the property of the sureties, Buff and Drake, and injunctions restraining the transfer by them of said properties (R. 36, par. 9). The case was referred to a master (R. 34, par. 5).

Dempsey was in default in paying the claims of the other creditors of The Stores and the liabilities of the receiver, as provided in the offer (R. 15, par. 4), and accordingly, on April 16, 1931, the receiver, your petitioner, filed an ancillary bill of complaint in the original receivership proceedings in the District Court, against said Dempsey and

his sureties, Buff and Drake, as obligors on the bond (R. 14-18), and in this ancillary bill the receiver sought to force Dempsey and his sureties to pay over to the Clerk of the District Court, for the use and benefit of the receiver, the creditors of the receiver and the creditors of The Stores, the balance due on account of the purchase price of the assets of The Stores (R. 17, par. 2). This balance included the remainder of the dividend due Raphael, the respondent herein (R. 3 and 4, par. J). On July 16, 1931, all parties to the bill consenting, a decree was entered by the District Court in which it was "ordered, adjudged and decreed that judgment for the plaintiff in the sum of $33,026.83, together with costs, be entered against the defendants," Drake, Buff and Dempsey (R. 20). This sum of $33,026.83 included the amount due Raphael (R. 3 and 4, par. J).

Nothing was obtained on execution on this judgment, and on October 7, 1931, the receiver, your petitioner, filed in the original receivership proceedings in the District Court a petition for contempt as to the defendants Buff and Drake, sureties on the bond (R. 21-24). The receiver alleged in this contempt petition that he was informed and believed, and upon such information and belief alleged, that said Buff and Drake were financially able to pay the full amount of the judgment rendered against them in the ancillary proceeding and had in their possession and control assets sufficient to satisfy said judgment in full (R. 23 and 24, par. 15). At the hearing on this contempt petition, all parties (the receiver, Dempsey, Buff and Drake) consenting, the District Court ordered the sureties to pay the receiver $1000 on the 20th of October, 1931, and a like sum on the 20th of each month thereafter until the execution issued on the judgment in the ancillary bill was satisfied, the final disposition of the matter being held pending further orders of the Court (R. 26). Pursuant to this order, the sureties, Buff and Drake, are paying $1000 a month to the counsel for the receiver (R. 4, par. K).

In the meantime the suit on the bond by Raphael against Dempsey and his sureties in the Massachusetts Court was prosecuted to a point where the master's report was filed, and was confirmed by the Court on October 20, 1931 (R. 35, par. 6). Thereafter, on November 13, 1931, Raphael filed a motion in the State Court proceeding for the entry of a final decree, and presented a form of draft decree (R. 35, par. 7). The master found that the sureties, Buff and Drake, owned and controlled certain stocks, mortgages and other properties (R. 47 and 48), but he did not make any finding as to the market value of said properties. The draft decree directs the sureties, Buff and Drake, to pay the respondent, Raphael, the sum of $9300, together with interest in the amount of $390.60 and costs, and on their failure to satisfy this indebtedness directs a special master to collect and sell their stocks, mortgages and other properties and use the proceeds thereof to satisfy the amount of the decree (R. 29, 30 and 31, pars. 4, 5 and 6).

On November 27, 1931, the receiver, your petitioner, filed a motion in the original receivership proceedings in the District Court, seeking to have modified the order of March 23, 1931, which granted Raphael, the respondent herein, leave to bring suit on the bond, and seeking to enjoin Raphael from further prosecuting his cause of action in the Massachusetts Court, "except insofar as to reduce his claim to judgment" (R. 27-28). Pursuant thereto an order of notice was issued, directed to the respondent, Raphael (R. 32). A copy of said order was served by the United States Marshal upon Mark Horblit (R. 32), the attorney who appeared for said Raphael on his petition for leave to sue on the bond (R. 9). No service of this order of notice was made on the respondent, Raphael, who is and was a resident of Connecticut (R. 7 and 33). Raphael filed a plea to this motion of the receiver on December 3, 1931 (R. 33-38), and after a hearing the District Court entered an order on December 7, 1931, modifying its order of March 23, 1931,

whereby Raphael was permitted to sue on the bond, and enjoining Raphael from further prosecuting his suit in the Massachusetts Court, except that he might proceed to judgment, but no further (R. 59 and 60). The District Court further ordered Dempsey and his sureties to pay Raphael the sum of $390.60 interest and his costs in the State Court proceeding, amounting to $171.10 (R. 60). A stenographic transcript of the hearing on this motion may be found at pages 51-59 of the record.

On December 28, 1931, Raphael filed an appeal from this order of the District Court, which was entered December 7, 1931, on the receiver's motion to modify (R. 60 and 61), together with an appeal bond (R. 62) and an assignment of errors in support of his appeal (R. 61 and 62).

The assignment of errors alleged (R. 61 and 62):

> "1. That the court erred in assuming jurisdiction over the appellant.
>
> "2. That the appellant being a resident of another State and being a litigant in another court, the District Court had (fol. 66) no jurisdiction to enjoin the appellant with respect to the proceedings in such other court.
>
> "3. That there was no such services of process upon the appellant as to warrant the issuance of the injunction against him.
>
> "4. That the motion on which the order was issued was not a sufficient or proper proceeding to warrant the issuance of said order.
>
> "5. That George B. Monroe, as receiver, has no legal or equitable interest in the State court proceedings referred to in said order and no standing to entitle him to an injunction against the appellant.
>
> "6. That there was error in failing to apply the equitable principles of laches and estoppel against the application made by the receiver in said motion.
>
> "7. That it was inequitable to enjoin the appellant

from proceeding with the State court proceedings referred to in the order.

"8. That the order was not warranted in the absence of evidence to support the application therefor.

"9. That the order interferes with the lawful prosecution by the appellant of the State court proceedings and thus deprives him of valuable rights.

"10. That it was inequitable to modify the order of March 23, 1931, after the appellant had in good faith instituted and prosecuted the State court proceedings under the authority thereof.

"11. That said order is erroneous in that it interferes with the appellant's legal and constitutional right to prosecute the State court proceedings therein referred to.

"12. That said order was not warranted by the record and was contrary to law."

On June 27, 1932, the Circuit Court of Appeals for the First Circuit reversed this order of the District Court entered on December 7, 1931, and remanded the case to that Court (R. 75). Mr. Justice Morton dissented from the majority of the Court. The opinion of the Circuit Court of Appeals and dissenting opinion of Mr. Justice Morton may be found at pages 64-74 of the record and at 60 Fed. (2d) 16.

The receiver, your petitioner, filed a petition for a writ of certiorari on September 27, 1932 (R. 75). This petition was granted by this Honorable Court and an order allowing certiorari was filed November 7, 1932 (R. 75).

Outline of Argument.

I. Introductory consideration.

II. The United States, through the receiver, its officer, is the real obligee of the bond and has the sole right to sue thereon. If an individual creditor can bring suit on the bond, it is only with the permission of the District Court.

III. At any time in its sole discretion, on motion of the receiver, your petitioner, the District Court could modify or withdraw its previous order granting the respondent, Raphael, leave to sue on the bond.

IV. The order of the District Court on December 7, 1931, modifying and withdrawing its previous order granting the respondent, Raphael, leave to sue on the bond and restraining the action which the respondent had brought in the Massachusetts Court pursuant to said leave, is not an abuse of the Court's discretion.

V. The order of the District Court on December 7, 1931, does not violate the provisions of section 265 of the Judicial Code, which prohibits a Federal Court from staying proceedings in a State Court.

VI. The order of the District Court on December 7, 1931, does not violate the equitable principles of laches and estoppel.

VII. The District Court did not err in assuming jurisdiction over the respondent, Raphael, on the receiver's motion to amend.

VIII. Conclusion.

Argument.

I.

Introductory Consideration.

The underlying consideration in this case concerns the orderly and equitable administration of the receivership of The Stores in the District Court.

When the assets of The Stores were sold, the bond was delivered to the Court in payment for the receivership property. The possession of this bond and control of its enforcement are both in the District Court, and the sole right of suit is vested in the receiver. An individual creditor, if he can sue on the bond at all, can only do so after obtaining permission from the Court itself. It is through the bond, in

fact, that the Court and the receiver have retained command of the situation. It is an integral part of the receivership.

On March 23, 1931, when Raphael, the respondent, petitioned the District Court that he be permitted to sue on the bond, there was no particular objection to allowing this creditor to institute an individual suit. The sureties, Buff and Drake, had filed affidavits showing that their net worth was several hundred thousand dollars (R. 4-7), and this sum was many times the amount for which they were obligated under the terms of the bond (R. 3 and 4, par. J). There was no thought of there being insufficient funds or assets to satisfy the obligation. Furthermore, the receiver had not brought suit on the bond at this time, for the purchaser had only been in default a few weeks and it was expected that the amount due would be paid.

On November 27, 1931, however, when the receiver, your petitioner, moved to amend the order of the District Court allowing Raphael to sue on the bond, the situation had changed materially.

In the meantime the respondent, Raphael, had instituted suit on the bond in the Massachusetts Superior Court pursuant to said permission (R. 34, par. 4), and had procured attachments and injunctions on practically all of the property of the sureties (R. 36, par. 9).

In the meantime, but subsequent to the institution of Raphael's action in the State Court, the receiver had brought suit on the bond for the amount of thirty per cent of the claims of all the creditors (R. 14-18), and had recovered a judgment in the sum of thirty-three thousand and twenty-six dollars and eighty-three cents ($33,026.83) (R. 20), including the unpaid balance of the claim of the respondent, Raphael (R. 3. and 4, par. J). This judgment had not been paid, and the receiver had petitioned the sureties for contempt (R. 21-24), alleging that they had filed affidavits showing their net worth to be several thousand dollars (R. 21 and 22, par. 6), and that he was informed and believed

that said sureties were financially able to pay the full amount of the judgment (R. 23 and 24, par. 15).

It then appeared that perhaps the sureties, Buff and Drake, had misrepresented their true wealth, and that the actual cash value of whatever assets they did possess was far less than the figures to which they had attested in their affidavits (see the remarks of the District Court at the bottom of page 54 of the record). The receiver, your petitioner, then realized that his information and belief as to the wealth of the sureties was not correct. He saw that whatever assets they did own were subject to the attachments and injunctions of the respondent, Raphael, in his suit on the bond in the Massachusetts State Court. Finding himself in this dilemma, he procured an order, on the petition for contempt, that the sureties pay him the sum of one thousand dollars ($1000) a month in liquidation of the amount of the judgment (R. 26).

About this time the suit of the respondent, Raphael, in the State Court was ripe for a final decree (R. 35, par. 6). A draft decree was filed, directing a special master to collect and sell the various properties of the sureties, Buff and Drake, to satisfy the individual claim of Raphael (R. 28-31). These assets consisted of equities in real estate, mortgages and unlisted stocks of relatively small business concerns (R. 29, 30 and 31, pars. 4, 5 and 6).

It is a matter of common knowledge in these days that equities in real estate are practically wiped out, that second mortgages are of no actual value and that unlisted securities in small businesses have no cash value, regardless of what the par value of the stocks may be. If these properties were actually sold, they would realize only a small fraction of their par value and their face value. There would be hardly enough to satisfy the individual claim of the respondent, Raphael, and the other creditors, and the receiver might be forced to go begging.

When confronted with these facts and possibilities, the receiver, your petitioner, moved the District Court to modify its previous order granting the respondent, Raphael, permission to sue on the bond, and to enjoin the prosecution of the State Court proceedings any further than judgment (R. 27 and 28). The situation was adequately expressed by counsel for the receiver at the hearing on this motion (R. 52):

> "Now, Mr. Horblit (counsel for Raphael) is entitled to his money without question, but the other creditors are also entitled to their money.
>
> . . . . . .
>
> "The situation as I see it is this: If the court permits the entry of the decree in the Superior Court it will handicap this court in the administration of the receivership estate because we will have nothing to go against in order to enforce the decree of this court as to the payment of the money, except put him in jail. I would rather have the money than put him in jail. That is my entire position in this case."

The majority of the Circuit Court were in error when they said (R. 71) that it was evident there was no question of preference by Raphael over the other creditors, because Raphael had alleged in his plea that Buff and Drake possessed property of a value far in excess of the amount of their obligation to all the creditors of The Stores, and because in the preparation of the record on the appeal in this case it was agreed by the parties that "The statements set forth in the plea of Louis Raphael . . . with respect to said proceedings in the Suffolk Superior Court . . . and with respect to the proceeding in said United States District Court . . . are true" (R. 3, par. I). Your petitioner points out that it was *agreed* that the *statements with regard to said proceedings in the State and Federal Courts* were *true*. There was *no agreement*, however, as to the *truth of the*

allegations in Raphael's plea or the facts set forth therein, *other than* the *fact that certain pleadings were filed* and the *fact that the Court took certain action* thereon.

The sureties, Buff and Drake, had misrepresented their true wealth, and whatever assets they did possess are of questionable value under present conditions. These assets are attached in the respondent's action on the bond in the Massachusetts Court and if they are sold to satisfy the respondent's claim in that proceeding they would probably not realize enough to cover the claims of the other creditors. As a practical result the respondent, Raphael, will obtain an inequitable preference to the disadvantage of the other creditors and the receiver, for the assets of the sureties will have been exhausted, leaving an empty obligation on the bond.

The consideration involved in this case is therefore purely one of the proper and orderly administration of a receivership in the Federal District Court and the equitable liquidation of the receivership estate.

II.

THE UNITED STATES, THROUGH THE RECEIVER, ITS OFFICER, IS THE REAL OBLIGEE OF THE BOND AND HAS THE SOLE RIGHT TO SUE THEREON. IF AN INDIVIDUAL CREDITOR CAN BRING SUIT ON THE BOND, IT IS ONLY WITH THE PERMISSION OF THE DISTRICT COURT.

The bond in question was given in the receivership and its obligation runs to "the United States of America" as obligee. It was given as part of the purchase price of the receivership property, and was imposed as a condition of the sale by the District Court, which was administering the estate.

The District Court, through the receiver, its officer, has undertaken to administer the assets of The Stores in an equitable manner for the benefit of all the creditors. It has

the duty of seeing that all the creditors receive equal treatment, a duty to see that each creditor receives his proportionate share of the assets. It is responsible for the administration and liquidation of the estate.

With this as a background, it would seem that the bond was given to the United States as the real obligee and that the receiver, the officer of the District Court of the United States, which is administering the receivership, has the sole right to sue upon it in the name and behalf of the United States for the ultimate benefit of all the creditors. It would seem that an individual creditor is neither an obligee nor a real party in interest, and cannot as a matter of right bring suit on the bond either in his own name or in the name of the United States. Therefore, if an individual creditor can sue on the bond at all in his own behalf, he much first get permission from the District Court to institute such a suit.

Any other construction of the bond flouts the common sense of the situation and the intention and duty of the District Court. It would lead to a multitude of individual suits by all of the creditors of the receivership, and if the assets of the sureties on the bond were insufficient to pay all of the creditors one hundred per cent of the amount of their just due, we would be faced with a curious spectacle of one creditor competing against the other creditors to obtain a preference to which he is not entitled through the means which were adopted to safeguard the equitable payment of the purchase price for which the receivership property was sold. It would lead to a free-for-all on the bond, in which the prize, the assets of the obligors, would go to the quickest and the smartest. It is obvious, therefore, that the District Court, through the receiver, its officer, retained control of the situation through the bond. This construction was adopted by Mr. Justice Morton in his dissenting opinion in the Court below (R. 73 and 74):

> "I also differ from my brethren in their construction of the bond, as being suable by individual creditors for

their own benefit. It is conditioned only that Dempsey shall fulfill his contract with the receiver; there is nothing in it about creditors or their claims. In my opinion it was suable only on the relation of the receiver by whom it was taken and with whom the contract which it secured was made. The present bond differs from those given to protect material men, in that a receiver is here interposed between the creditors and the obligors."

The authorities to support or refute the above analysis and construction of the bond in question are surprisingly sparse, and none of them are mandatory on this Honorable Court. Most of the cases involve the official bonds of clerks of court, administrators, trustees in bankruptcy, or the like, and most of the bonds are given under the requirements of a statute. Furthermore, in none of them is there interposed between the principal and sureties on the bond and the ultimate beneficiaries, any officer who represents said beneficiaries and could sue for them all.

Cases of this sort have been cited by the respondent, Raphael, on his brief in the Court below and on his brief against certiorari in this Court. For the most part they hold that the injured party is the real party in interest on the bond, so that it is his citizenship which is taken into consideration in determining a question of Federal jurisdiction on the ground of diversity of citizenship.

Maryland v. *Baldwin*, 112 U.S. 490.
Howard v. *United States*, 184 U.S. 676.
United States, ex rel., v. *Ruggles*, 221 Fed. 256.
Alexander v. *Union Surety & Guaranty Co.*, 85 N.Y. S. 282.

Such cases, however, do not control the construction of the bond in the case at bar. The facts of this case and the background surrounding this bond are sufficient to distin-

guish it from the authorities cited above. This bond is not an official bond, nor is it required by statute. It is purely a requirement of the District Court as part of the purchase price of the assets of the receivership. Furthermore, the receiver, the officer of the District Court, is interposed between the purchaser of the assets and his sureties on the one hand and the creditors of the receivership on the other. There is an intermediate party representing all of the ultimate beneficiaries, an officer to sue upon the bond.

In *U.S. F. & G. Co.* v. *Kenyon*, 204 U.S. 349, this Court considered cases of the sort above suggested by the respondent, Raphael, including the case of *Maryland* v. *Baldwin*, *supra*. Yet, in the face of these authorities, this Court held that the United States, named as obligor of a contractor's bond, was a real party in interest. To be sure, that bond was given pursuant to a Federal statute for the benefit of material men and laborers on Federal construction projects, and to be sure this Court merely held that the United States was a real party in interest on the bond for the purpose of determining Federal jurisdiction. Nevertheless, this Court distinguished the bond in that case from the bonds in the authorities above cited, and based its distinction on the background surrounding a Federal construction bond, the interest and duty of the United States, the party which required the bond, and the results of such construction. At pages 356 and 357 this Court said:

> "This case differs from those just cited and stands, we think, on exceptional grounds. The United States is not here a merely nominal or formal party. It has the legal right, was a principal party to the contract, and, in view of the words of the statute, may be said to have an interest in the performance of all its provisions. It may be that the interests of the Government, as involved in the construction of public works, will be subserved if contractors for such works are able to obtain

materials and supplies promptly and with certainty. To that end Congress may have deemed it important to assure those who furnish such materials and supplies that the Government would exert its power directly for their protection. It may well have thought that the Government was under some obligation to guard the interests of those whose labor and materials would go into a public building . . . The bond is not simply one to secure the faithful performance by the contractor of the duties he owes directly to the Government in relation to the specific work undertaken by him. It contains, as just stated, a special stipulation with the United States that the contractor shall promptly make payments to all persons supplying labor and materials in the prosecution of the work specified in his contract. This part of the bond, as did its main provisions, ran to the United States, and was therefore enforceable by suit in its name. We repeat, the present action may fairly be regarded as one by the United States itself to enforce the specific obligation of the contractor to make prompt payment for the labor and materials furnished to him in his work. There is therefore a controversy here between the United States and the contractor in respect of that matter. The action is none the less by the Government as a litigant party, because only one of the persons who supplied labor or materials will get the benefit of the judgment. We are of opinion . . . that it is not an unreasonable construction of the words in the Judiciary Act of 1887-88, 'or in which controversy the United States are plaintiffs or petitioners,' to hold that the United States is a real party and not a mere nominal plaintiff in the present action, and therefore the Circuit Court had jurisdiction."

The background surrounding the giving of the bond, the interest and duty of the party requiring the same, and the

results of its possible constructions, are equally as important factors in determining the construction of the bond in the case at bar and distinguishing it from those in the cases cited by the respondent, as they were in the Kenyon case.

The respondent, Raphael, in his brief in the Court below and in his brief against certiorari in this Court suggests that under the terms of the offer the obligation of the purchaser, Dempsey, to pay thirty per cent of the claims runs directly to the individual creditors, and from this he argues that the obligation of the principal and sureties on the bond also runs directly to the creditors. This conclusion, however, does not necessarily follow, because, even though the obligation of the purchaser under the terms of the offer runs directly to the individual creditors, as the respondent maintains, nevertheless, the obligation of the principal and sureties on the bond runs to the petitioner, the receiver.

If the purchaser's obligation were fufilled, it would matter little whether it were paid to the receiver or directly to the creditors. The result would be the same, for in either event each creditor would receive his just share and the liquidation of the assets of the receivership would be orderly and equitable. If the purchaser's obligation were not fulfilled, however, it would become rather imperative that some control of the liquidation be retained by the District Court and the receiver. Otherwise the orderly and equitable administration and liquidation of the receivership estate would be prejudiced, and the duties and interest of the District Court would be thwarted. Therefore the District Court, through the receiver, must have retained control of the situation through the obligation of the principal and sureties on the bond.

The respondent, Raphael, has also suggested in his previous briefs that the sureties, Buff and Drake, and the District Court have recognized that the obligation of the sureties on the bond ran directly to the individual creditors. The sureties themselves have paid $1200 to the respondent,

Raphael, and the District Court has granted the respondent's petition for leave to sue on the bond.

In answer to these observations, your petitioner says that the action of the sureties in paying $1200 directly to the creditor, Raphael, in no way binds the receiver to any particular construction of the bond, and the action of the District Court in granting Raphael permission to sue is not inconsistent with the construction contended for in this argument. At no time has your petitioner or the District Court ever maintained that the obligation belonged to the individual creditors as a matter of right. On the other hand, in the order on the contempt petition the Court expressly stipulated that the sureties pay $1000 a month, not to the creditors nor the Clerk of Court, but to the receiver (R. 26). Moreover, when the respondent, Raphael, petitioned the Court for leave to sue (R. 7-9), he admitted that the obligation of the bond did not run to the creditors individually as a matter of right.

In the case of *Illinois Surety Co.* v. *United States*, 226 Fed. 665, the Circuit Court of Appeals for the Seventh Circuit held that a suit on a depository bond given under the provisions of the Bankruptcy Act should be brought in equity for the benefit of all the interested parties. At page 668 Mr. Justice Mack said:

> "The object of the bond is to afford protection to all beneficiaries alike. The spirit of the whole Bankruptcy Act would be violated, if the vigilant depositor could, by suit in his own interest, exhaust the obligation. Each depositor is entitled only to his proportionate share. If, however, each depositor could bring an action at law for his own use to obtain his proportionate share, the possible diversity of opinion as to what that share is might result either in subjecting the defendant to judgments in excess of the penalty or in defeating the just claims of later litigants. Only in a proceedings

in which all interested parties will have an opportunity to be heard, and resulting in a judgment or decree that will be res judicata as to the surety as well as to all depositors, can justice be done."

This quotation has been cited with approval in the case of *In re Singer Furniture Corp.*, 47 Fed. (2d) 780, at 783, but the holding of the case has been limited by this Court in *Illinois Surety Co.* v. *United States to the Use of Peeler*, 240 U.S. 214, where it was held that a suit on a contractor's bond would not lie in equity, but only at law. Recent authorities have sought to reconcile the decision of Mr. Justice Mack and the holding of the Peeler case by pointing out that in the former case the amount of claims exceeded the amount of the bond which secured them, while in the latter case the bond was ample to take care of the claims which it secured.

Bolser v. *United States*, 26 Fed. (2d) 4, at 9.
Fidelity & Deposit Co. of Maryland v. *United States*, 35 Fed. (2d) 940, at 941.

Your petitioner merely cites the case of *Illinois Surety Co.* v. *United States, supra*, and the language of Mr. Justice Mack as persuasive authority for the construction of the bond in the case at bar, herein contended for.

The object of the bond was to insure the proper administration of the receivership and the object of the receivership was to secure to each creditor his proportionate share of the estate in liquidation. This purpose would be violated if a "vigilant" creditor could bring suit on the bond in his own behalf, for in this manner he could to all practical purposes exhaust the obligation (see point I of this argument). These observations must be taken into consideration in determining the construction of the bond.

III.

AT ANY TIME IN ITS SOLE DISCRETION, ON MOTION OF THE RECEIVER, YOUR PETITIONER, THE DISTRICT COURT COULD MODIFY OR WITHDRAW ITS PREVIOUS ORDER GRANTING THE RESPONDENT, RAPHAEL, LEAVE TO SUE ON THE BOND.

The order of the District Court allowing the respondent, Raphael, to sue on the bond, if it amounted to anything, was an administrative and discretionary order. It did not amount to a final decree which cannot be modified on motion and which cannot be appealed from in another term of court.

The bond was given to the District Court and the receiver, its officer, in return for the sale of the receivership assets. The control of the bond is vested exclusively in the Court. The receiver alone can sue upon it as a matter of right, and if the Court in the exercise of its discretion can allow an individual creditor to sue upon it, surely this same Court can modify or withdraw the permission at any later date in its sole discretion. Certainly the Court is not bound irrevocably to allow the creditor to consummate his individual suit in the State Court. Facts subsequently arising, or new light coming to the Court as to then existing conditions, may demand some modification of the Court's permission.

An order of a Court issued on a petition of a third party to intervene in a suit pending in that Court is not usually a final decree. It is rather a discretionary order which is not appealable.

Ex parte Cutting, 94 U.S. 14, at 22.

Credits Commutation Co. v. United States, 177 U.S. 311, at 317.

Ex parte Leaf Tobacco Board of Trade, 222 U.S. 578, at 581.

City of New York v. Consolidated Gas Co. of N.Y., 253 U.S. 219, at 221.

City of New York v. *N.Y. Tel. Co.*, 261 U.S. 312, at 316.

Lewis v. *Baltimore & L.R. Co.*, 62 Fed. 218, at 221 and 222.

Blaffer v. *New Orleans Water Supply Co.*, 160 Fed. 389, at 391.

Barceloux v. *Buffum*, 51 Fed. (2d) 82, at 85.

In the usual case of a petition of a third person to intervene in a particular action, the denial of the petition concludes no rights, for the petitioner is left free to assert his claim in another proceeding or another tribunal. Intervention is not usually a matter of right.

Exceptional circumstances do arise in certain cases, however, as a result of which the denial of the petitioner's request to intervene amounts to a definite determination of the rights of the petitioner. In a few of these peculiar cases the petitioner may not be able to assert his right other than in the action in which he sought to intervene. In such cases there is a final disposition of the petitioner's claim, denying all relief, and the order of the Court refusing intervention is a final decree which is appealable. In such cases intervention is a matter of right.

Credits Commutation Co. v. *United States*, *supra*, at 315 and 316.

City of New York v. *N.Y. Tel. Co.*, *supra*, at 317.

Whittaker v. *Brictson Mfg. Co.*, 43 Fed. (2d) 485, at 489.

Barceloux v. *Buffum*, *supra*, at 85.

Cyclopedia of Federal Procedure, sec. 2608.

The elements determining whether an order be a final decree or a discretionary order are the same in the case of petitions for leave to sue a receiver. If the order involves a determination of a substantial right in such a manner as

to leave a party with no adequate relief, the order is a final decree and is appealable.

An order granting leave to sue in a State Court, a receiver appointed by a Federal Court, has been held to be an administrative, discretionary order, and not an appealable, final decree.

> *New York Security & Trust Co. et al.* v. *Illinois Transfer R. Co.*, 104 Fed. 710.
> *Investment Registry, Ltd.*, v. *Chicago & M. Electric R. Co.*, 251 Fed. 510, at 512 and 513.

In the case of *Odell* v. *H. Batterman Co.*, 223 Fed. 292, however, the Court held that the denial of a landlord's petition to be allowed to bring an ejectment proceeding in a State Court against a receiver appointed by a Federal Court, was a final decree and appealable. This holding was based on the assumption that the order of the Court refusing leave to bring the ejectment suit in the State Court was, in effect, a refusal to allow the adjudication of the landlord's claim in any sort of proceeding. Therefore the Odell case may be classed as one of those peculiar situations in which the denial of the petition amounts to a disposition of the claim, denying all relief.

> See *Field* v. *Kansas City Refining Co. et al.*, 296 Fed. 800, at 806.

The order of the District Court granting Raphael permission to sue on the bond was an administrative, discretionary order, and not a final decree. Unlike the Odell case, there was no determination of a substantial right against the respondent so as to leave him with no adequate relief. The request for permission was not denied, and no definite status was created.

Even though Raphael's petition to be allowed to sue had been refused, the order of the Court denying this petition would nevertheless still have been a discretionary order.

Raphael could not sue on the bond as a matter of right, for that right was vested in the receiver who included the amount of Raphael's claim in the sum for which he brought his ancillary bill against the sureties on the bond (R. 20, and R. 3 and 4, par. J). Therefore the respondent's claim was duly protected, and the denial of his petition for leave to sue would not have precluded him from all relief.

The order granting Raphael leave to sue on the bond, being an administrative and discretionary order, may be modified or revoked at any time by the District Court on motion of the receiver.

In the case of *Buckhannon & N.R. Co.* v. *Davis,* 135 Fed. 707, a Federal District Court had granted permission to bring suit in a State Court against a receiver appointed by the Federal Court. At a later date the receiver filed a motion to set aside the order giving permission to sue and restraining the action in the State Court. The receiver's motion was allowed, the Court saying, at page 709:

> "It is contended by the appellant that the Court did not have power to revoke, annul, or modify its order of October 27, 1903, which granted permission to sue the receiver, and reserved the question as to the forum in which the suit should be brought. The Court undoubtedly had the right to attach any reasonable condition to the order which granted permission to sue the receiver, and, if necessary, to modify or revoke any order which it might have improvidently granted."

In the case of *Investment Registry, Ltd.*, v. *Chicago & M. Electric R. Co., supra,* the order of a Federal Court allowing suit against its receiver in a State Court was vacated, and the proceedings in the State Court were enjoined. At page 512 and 513 the Court said:

> "The prime end to be served is the due and proper conservation of the property in the hands of the court,

in order that there may be prompt and proper administration thereof for the benefit of all having any interest therein. If at any stage of the proceedings the court deems it proper and advisable that any demand or question be litigated elsewhere than in the federal court, it can authorize such litigation to be elsewhere instituted. But neither on principle nor authority does it follow that the court granting the leave to sue may not recall it, if before adjudication in such other tribunal the court granting the leave shall consider, either because of facts subsequently arising, or of new light coming to it as to then existing conditions, it would best subserve the due administration of the estate to recall the granted leave.

"Under such circumstances there is involved no question of comity between different courts, but only that of the best interest of the estate which the Court is administering . . . The order granting leave is not final in the sense that thereby a definite status is fixed.

. . . . . .

"We are of opinion that under the circumstances the order granting leave to sue the receiver in the state court was revocable at the discretion of the court which granted it, and that the order revoking the leave and enjoining appellant from prosecuting the lien elsewhere than in the District Court was a proper order to be entered, unless from all the facts appearing the District Court abused its discretion in that regard."

By analogy from the two authorities just cited above there would seem to be no doubt but that on motion of the receiver the District Court could at any time in its sole discretion modify or withdraw its previous order granting Raphael permission to sue on the bond. The District Court through the bond has complete control of the obligation thereon. The sole right to sue on it is vested in the receiver, and if

the Court can grant an individual creditor leave to sue, it can certainly modify or revoke such permission in its sole discretion on motion of the receiver, its officer.

IV.

THE ORDER OF THE DISTRICT COURT ON DECEMBER 7, 1931, MODIFYING AND WITHDRAWING ITS PREVIOUS ORDER GRANTING THE RESPONDENT, RAPHAEL, LEAVE TO SUE ON THE BOND AND RESTRAINING THE ACTION WHICH THE RESPONDENT HAD BROUGHT IN THE MASSACHUSETTS COURT PURSUANT TO SAID LEAVE, IS NOT AN ABUSE OF THE COURT'S DISCRETION.

Perhaps the District Court should have refused Raphael's request to be allowed to sue on the bond and retained the enforcement of the bond and the administration of the estate within its exclusive supervision. In any event it would probably have led to a more orderly administration of the receivership.

At the time of the filing of the petition for leave to sue there was no particular objection to allowing the creditor, Raphael, to sue on the bond in his own behalf. After permission was granted, however, and action was commenced in the Massachusetts Court pursuant to said leave, the situation changed. New facts subsequently arising and new light as to then existing conditions demanded that the leave to sue be recalled in order to best subserve the proper administration of the estate.

> See *Investment Registry, Ltd.*, v. *Chicago & M. Electric R. Co., supra*, at 512.

The orderly and equitable administration of the receivership was threatened by the action which Raphael had commenced in the State Court. If this action were allowed to continue to execution and the sale of the sureties' assets, which were attached therein, it would probably have resulted in an inequitable preference to Raphael at the expense of the

other creditors (see point I of this argument). The situation is ably presented by Mr. Justice Morton in his dissenting opinion in the Court below (R. 73 and 74):

> "The suit by the receiver and his recovery of a complete judgment covering the claims of all parties under the bond greatly changed the situation from what it was when leave to sue in the State Court was granted to Raphael. It became a question whether one creditor should be allowed to press his claim in competition with the receiver who was acting for all creditors and for the estate. In forbidding him from doing so, I think the District Judge was plainly right. The contrary view leads to the curious spectacle of one creditor being permitted to compete against the receiver and the other creditors, to obtain preference to which he is not entitled, through the means which were adopted to safeguard the payment of the purchase price for which the receivership property was sold. Raphael's complaint against the injunction order is that it deprives him of this advantage and puts him on an equality with the other creditors,—which I think is where he belongs, while my brethren apparently think him entitled to his preference.
>
> . . . . . .
>
> "The Dempsey bond and all proceedings on it were, essentially, parts of the liquidating receivership in the District Court. The whole thing ought to have been retained there. The order permitting suit in the State Court, if it amounted to anything, was ill-advised. The District Judge was right in recognizing that fact and revoking the order."

The respondent, Raphael, is deprived of no right or advantage that was his as a matter of right. He is merely put on an equality with the other creditors, which is where he

belongs. His claim has been protected by the receiver. It was included in the sum for which judgment was obtained in the ancillary proceedings on the bond, instituted by the receiver for the benefit of all the creditors.

In the case of *Investment Registry, Ltd.*, v. *Chicago & M. Electric R. Co., supra,* a District Court vacated its previous order granting leave to sue its receiver in a State Court and enjoining the prosecution of the suit in question in any Court but the Federal Court. In the case of *Field* v. *Kansas City Refining Co., supra,* a District Court ordered that an appellant file his claim in the receivership proceedings in the Federal Court, and also for protection authorized him to sue the receiver in the State Court, enjoining the State Court proceedings after the commencement of the suit.

In both of the above-cited cases the State Court action was enjoined, but in each instance the creditor's claim was protected in the Federal Court. So, in the case at bar, the action which Raphael had commenced in the Massachusetts Court was enjoined, but his claim was protected in the receiver's ancillary bill.

The order of the District Court revoking its previous leave to sue and enjoining the State Court proceedings is in no way inequitable or prejudicial to the respondent. A fair allowance was made in the order for interest and costs in the proceeding in the Massachusetts Court (R. 59 and 60). Mr. Horblit, counsel for the respondent, assented to the amount of these items (R. 55). It was said in the case of *Investment Registry, Ltd.*, v. *Chicago & M. Electric R. Co., supra,* at 513:

> "If in the matter of expense or convenience appellant is prejudiced by the order, the District Court is empowered to make such adjustment as equitable considerations would suggest; . . ."

The respondent has complained that he will lose attachments in the State Court proceeding by expiration if that

case be prosecuted to judgment and enjoined thereafter. But how is he prejudiced by this? He had no right to sue on the bond and to get these attachments in the first place. It was only by permission of the District Court that this was possible. Therefore, in taking away what the Court in its, perhaps, ill-advised discretion allowed him to have, he is in no way subjected to any hardship. As was pointed out by Mr. Justice Morton, it merely puts him on a par with the other creditors, which is where he belongs.

If Raphael's contention as to the loss of his attachments be correct, however, and if this be deemed to be an objection to the order, the Court can easily protect the respondent by merely amending the order and the injunction to restrain him from prosecuting the State Court proceedings to judgment, instead of restraining him from prosecuting the action further than judgment. In this manner the attachments would not be lost by expiration after the entry of judgment, as suggested by the respondent, because judgment would not be entered.

V.

THE ORDER OF THE DISTRICT COURT ON DECEMBER 7, 1931, DOES NOT VIOLATE THE PROVISIONS OF SECTION 265 OF THE JUDICIAL CODE, WHICH PROHIBITS A FEDERAL COURT FROM STAYING PROCEEDINGS IN A STATE COURT.

The rule laid down by section 265 of the Judicial Code is merely an enactment of the rules of comity between the Federal and the State Courts. It provides as follows (36 Stat. c. 231, sec. 265, p. 1162):

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This rule is not only one of comity, to prevent unseemly conflicts between Courts whose jurisdiction embraces the same subjects and persons; it is also a principle of right and of law between State Courts and those of the United States.

Covell v. *Heyman*, 111 U.S. 176, at 182.
Kline v. *Burke Construction Co.*, 260 U.S. 226, at 229 and 230, and 231.

The background and the purpose of the rule and of the statute were ably stated by this Court in the Covell case, *supra*, at page 182:

> "The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State Courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void . . ."

It is recognized, however, that the rule and statute were not intended to limit the power of the Federal Courts to enforce their authority in cases that on other grounds are

within their proper jurisdiction. Therefore, in aid of its own jurisdiction properly acquired and in order to render effectual its judgments and decrees, a Federal Court may restrain proceedings in a State Court which would have the effect of defeating or impairing such jurisdiction.

Dietzsch v. *Huidekoper*, 103 U.S. 494, at 497.
Julian v. *Central Trust Co.*, 193 U.S. 93, at 112.
Hill v. *Burr*, 234 U.S. 712, at 723.
Kline v. *Burke Construction Co., supra*, at 229.

If a Federal Court has in its control and jurisdiction a specific matter, a specific thing, that *res* is withdrawn from the control and jurisdiction of the judicial power of the State Courts. Any exercise of jurisdiction by a State Court over this same matter or this same *res* prejudices and impairs the jurisdiction of the Federal Court which has already attached. Accordingly a Federal Court may restrain such proceedings in a State Court without violation of the statute or the rules of comity.

The case at bar presents just such a situation. The District Court has properly acquired jurisdiction of the administration of the receivership of The Stores, and in order to render the administration of said estate effectual and equitable, it was compelled to restrain the proceedings in the Massachusetts Court, which would have had the effect of impairing and defeating said administration.

The bond is an integral part of the receivership, a *res* in the possession and control of the District Court. It was given in return for the assets of The Stores, as a part of the purchase price and an instrument in the liquidation of these assets. Certainly it cannot be denied that a State Court could not interfere with any property previously subjected to the control of a Federal Court, any property subjected to administration and liquidation in a Federal Court. How does it differ, then, if these assets have been exchanged for a bond?

In the case of *Dietzsch* v. *Huidekoper, supra,* this Court said, at page 497:

> "The bond took the place of the property seized in replevin, and a judgment upon it was equivalent to an actual return on the replevied property."

The United States, through the receiver, its officer, is the sole obligee, with the sole right to sue on the bond, and an individual creditor can bring suit on it only with the permission of the District Court, if in truth he can sue on it at all. The bond and the obligation thereon are subject to the exclusive control of the District Court. Surely, then, said Court can restrain an action on the bond by the creditor, Raphael, in the Massachusetts Court, if only in this manner it could render effectual and equitable the liquidation of the assets of The Stores and the administration of the receivership.

In the case of *Richle* v. *Margolis,* 279 U.S. 218, at 223, it was said:

> "The appointment of a receiver of a debtor's property by a federal court confers upon it, regardless of citizenship and of the amount in controversy, federal jurisdiction to decide all questions incident to the preservation, collection and distribution of the assets. And it may despite § 265 of the Judicial Code, issue under § 262 or otherwise, all writs necessary to protect from inference all property in its possession."

In the following cases cited under point III of this argument a Federal Court had given permission to sue its receiver in a State Court and at a later date restrained the proceedings which were commenced in the State Court pursuant to said leave to sue:

Buckhannon & N.R. Co. v. *Davis, supra.*

Investment Registry, Ltd., v. *Chicago & M. Electric R. Co., supra.*
Field v. *Kansas City Refining Co., supra.*

The injunction in the case at bar against Raphael's suit on the bond in the Massachusetts Court is no more objectionable to the statute and the rules of comity than the injunction against the action in the State Court in the above cases. The District Court controls the right to sue, and an individual creditor cannot enforce the bond as a matter of right, since the obligation runs directly to the District Court and the receiver, its officer. That which the Court can give it can certainly take away.

In *Investment Registry, Ltd.*, v. *Chicago & M. Electric R. Co., supra*, it was said, at page 513:

> "Under such circumstances there is involved no question of comity between different courts, but only that of the best interest of the estate which the court is administering."

In the case of *Julian* v. *Central Trust Co., supra*, a railroad mortgage was foreclosed in a Federal Court and the property was sold pursuant to its order. The terms of the sale provided that the purchaser should pay all claims which were filed in the case and adjudged by the Court to be prior in lien to the mortgage foreclosed in the suit. They also reserved to the Court the right to retake and resell the property if the purchaser failed to comply with the terms of sale. A creditor obtained a judgment in a State Court against the former owner of the property and sought to levy on the property itself in satisfaction of his judgment. The Federal Court, however, restrained this levy in State Court proceedings in order to protect its prior jurisdiction and render effective its decree. At page 112 the Court pointed out that the provisions in the decree of sale in the Federal Court made it apparent that the intention of the Court was to re-

tain jurisdiction for the purpose of settling and determining what liens and demands the purchaser of the property should have to pay.

On the sale or disposition of receivership property in the following cases, a Federal Court retained some control over the administration of the property and estate, and, as in the Julian case, it had the right to enjoin proceedings in a State Court which interfered with its jurisdiction and said administration.

Jesup v. *Wabash Ry. Co.*, 44 Fed. 663.
Fidelity Insurance T. & S.D. Co. v. *Norfolk & W. R. Co.*, 88 Fed. 815.
Stewart v. *Wisconsin Central Ry. Co.*, 117 Fed. 782.
Lang v. *Choctaw &c. R. Co.*, 160 Fed. 355
Smith v. *Missouri Pac. R. Co.*, 266 Fed. 653.

By the same token it is apparent that in the case at bar the District Court intended to retain control of the liquidation and administration of the receivership of The Stores. Its possession of the bond and control of the obligation thereon are sufficient evidence of this fact.

The United States, through its officer, the receiver, has the sole right of action on the bond, and for this reason it would seem that the District Court could enjoin an action on the bond in a State Court by an individual creditor without violation to section 265 of the Judicial Code and the rules of comity. It does not seem that this statute was intended to apply to a situation wherein the United States is the exclusive party in interest.

United States v. *Inaba*, 291 Fed. 416, at 420.
United States v. *Babcock*, 6 Fed. (2d) 160, at 161.

VI.

THE ORDER OF THE DISTRICT COURT ON DECEMBER 7, 1931, DOES NOT VIOLATE THE EQUITABLE PRINCIPLES OF LACHES AND ESTOPPEL.

The essence of laches is not merely the lapse of time. It is principally a question of the inequity of allowing a claim to be enforced or an action taken, and unless the adverse party will be prejudiced, he cannot be heard to object. Two elements are essential: inexcusable delay and prejudice resulting therefrom.

Galliher v. *Cadwell*, 145 U.S. 368, at 372.

Southern Pacific v. *Bogert*, 250 U.S. 483, at 488 and 490.

Spiller v. *St. Louis R. Co.*, 14 Fed. (2d) 284, at 288.

Farmers' Bank v. *Halsey Stuart & Co.*, 21 Fed. (2d) 818, at 822.

United States v. *Alex Dussel Iron Works, Inc.*, 31 Fed. (2d) 535, at 536.

S. O. Haynes & Co. v. *Druggists' Circular*, 32 Fed. (2d) 215, at 217.

Fidelity & D. Co. of Maryland v. *Farmers' Bank*, 44 Fed. (2d) 11, at 19.

Wilkinson v. *Livingston*, 45 Fed. (2d) 465, at 469.

Patterson v. *Pendexter*, 259 Mass. 490, at 493.

Cohen v. *Bailly*, 266 Mass. 39, at 49.

Calkins v. *Wire Hardware Co.*, 267 Mass. 52, at 69.

Carter v. *Sullivan*, 1932 Mass. Adv. Sheets, 2113, at 2120 and 2121.

Likewise, for estoppel there must be more than mere delay. Unless the non-action operated to the prejudice of the

adverse party, there is no estoppel arising from the mere lapse of time.

Northern Pacific Ry. v. *Boyd,* 228 U.S. 482, at 509.
Fisher v. *Clark,* 22 Fed. (2d) 295, at 296.
In re Superior Trading Co., Inc., 22 Fed. (2d) 480, at 483.

A person seeking to invoke the doctrine of estoppel must have changed his position to his prejudice or injury as a result of reliance upon the action or conduct of the other party.

Lincoln v. *Gay,* 164 Mass. 537.
B. & A. R.R. Co. v. *Reardon,* 226 Mass. 286.
Nelson v. *Wentworth,* 243 Mass. 377.
Dodd & Co. v. *Tarr,* 251 Mass. 189.

The respondent, Raphael, cannot therefore object to the modification of the permission which the District Court had given him to sue on the bond. The receiver's delay in seeking such modification is not inexcusable, and the respondent can show no prejudice. Estoppel and laches are not involved.

Perhaps the granting of permission to Raphael to sue on the bond was ill-advised and had better been denied. Nevertheless, there was no particular reason at the time that demanded the refusal of his request to be allowed to sue. Some months later, however, the true situation came to light, and the receiver then sought to modify the leave which the Court had previously granted. Under these circumstances the delay is not inexcusable (see point I of this argument).

The respondent was in no way prejudiced by this delay, if it may be called delay. His costs in the action which he had commenced in the Massachusetts Court, and interest on the amount of his claim, were awarded him by the District Court. He was merely placed *in statu quo,* on a par with

the other creditors. He was merely placed where he would have been if the Court had not granted him the permission to sue. He was not deprived of anything that was his as a matter of right. Therefore, there was nothing inequitable in the order revoking the previous permission, for it merely took away from the respondent the inequitable advantage which the District Court had unwittingly given him (see point IV of this argument).

VII.

THE DISTRICT COURT DID NOT ERR IN ASSUMING JURISDICTION OVER THE RESPONDENT, RAPHAEL, ON THE RECEIVER'S MOTION TO AMEND.

If the District Court had no personal jurisdiction over the respondent or if action were brought in the wrong venue, the respondent could have appeared in the proceeding for the special purpose of objecting on these grounds, without subjecting himself to the jurisdiction of the Court. On the other hand, if he appeared generally in the proceeding, he is deemed to have waived any objection he might have had, for a general appearance cures all defects and irregularities pertaining to personal jurisdiction and venue.

Toland v. *Sprague*, 12 Pet. 300, at 320 and 321.
Shields v. *Thomas*, 18 How. 253, at 259.
Jones v. *Andrews*, 10 Wall. 327, at 332.
Fitzgerald &c. Co. v. *Fitzgerald*, 137 U.S. 98, at 105.
St. Louis &c. Co. v. *McBride*, 141 U.S. 127, at 130, 131 and 132.
Central Trust Co. of N.Y. v. *McGeorge*, 151 U.S. 129, at 132 and 133.
Interior &c. Co. v. *Gibney*, 160 U.S. 217, at 219 and 220.
In the matter of Moore, 209 U.S. 490, at 501.
Western &c. Co. v. *Butte &c. Co.*, 210 U.S. 368, at 370 and 372.

If the respondent, Raphael, was a resident of Connecticut and received no personal service of the order of notice on the receiver's motion, nevertheless he cannot be heard to object that the District Court did not have personal jurisdiction over him and power to enjoin him from prosecuting his action in the Massachusetts Court. Neither can he object that the receiver's motion should have been brought in the Federal District Court for Connecticut. These objections were merely personal privileges and exemptions which he has waived by appearing generally on the receiver's motion.

Pursuant to the order of notice and on the return day thereof the respondent filed a plea in which he recited at length the facts of the situation (R. 33-36, pars. 1-8), and joined various allegations attacking the merits of the motion (R. 36-38, pars. 9-12, and 14 and 15), with only one allegation attacking the jurisdiction and venue of the Court (R. 37, par. 13). The only indication that this appearance was to be restricted to objection to the jurisdiction was the words "appearing specially," which were found in the introduction (R. 33). These words, however, would seem to be contradicted by the prayer at the end of the plea (R. 38), which asks that the receiver's motion be denied rather than that it be dismissed for lack of jurisdiction.

An appearance which is not limited to some specific ground of objection to the jurisdiction of the Court is usually a general appearance, *Finance Corp. of New England* v. *Parker*, 251 Mass. 372, at 376, and any defense which goes to the merits of the proceeding submitted the defendant to said jurisdiction notwithstanding the fact the appearance was labelled "special." No words of reservation can make an appearance special which in fact goes to the merits.

Karrick v. *Trask*, 238 Mass. 476, at 478.
Crawford v. *Foster*, 84 Fed. 939, at 941.

The combination of a special plea to the jurisdiction and a plea to the merits of the proceeding, both in the same ap-

pearance, overrules the special plea and raises it to a general appearance. It is in substance an appearance to the merits, and submits the respondent to the jurisdiction of the Court.

Jones v. *Andrews, supra,* at 332.
Sugg v. *Thornton,* 132 U.S. 524, at 529 and 530.
St. Louis &c. Ry. Co. v. *McBride, supra,* at 130.
Western &c. Co. v. *Butte &c. Co., supra,* at 370 and 372.
Thames & Mersey &c. Co., Ltd., v. *United States,* 237 U.S. 19, at 24.
Crawford v. *Foster, supra,* at 941.
Christensen v. *Christensen,* 14 Fed. (2d) 475, at 476.
Currier v. *Beard,* 216 Mass. 113, at 114 and 115.

In the light of this analysis there would seem to be no doubt but that the respondent's plea amounted to a general appearance. It is not restricted to objection to the jurisdiction, but attacks the merits of the proceeding as well and prays that the motion be denied rather than that it be dismissed for lack of jurisdiction. Therefore, in spite of the wording of the introduction, "appearing specially," and the allegation objecting to the jurisdiction, the plea is in and of itself substantially a general appearance.

This conclusion is borne out by the fact that, at the hearing on the motion, on the same day on which the plea was filed, the respondent, Raphael, did not object to the jurisdiction of the Court. Counsel merely argued on the merits of the matter and the transcript of the hearing reveals no mention of, or objection to, the jurisdiction (R. 51-59). This action or conduct of the respondent at the hearing on the motion determines the nature of his appearance without any shadow of doubt, for it indicates his true intention and the extent of the operation of his plea.

The jurisdiction and venue of the District Court in this matter, however, does not depend upon the general appearance of the respondent, Raphael, for the receiver's motion was an ancillary proceeding, supplementary to the original receivership and the respondent's petition for leave to sue. Raphael had previously subjected himself to the jurisdiction of the Court in the parent proceeding when he proved his claim in the receivership and filed the petition for leave to sue. This jurisdiction carried over to the present motion for the jurisdiction to maintain all such dependent and ancillary matters is referable to the original parent proceeding.

Freeman v. *Howe*, 24 How. 450, at 460.
Jones v. *Andrews*, *supra*, at 333.
Krippendorf v. *Hyde*, 110 U.S. 276, at 280 and 281.
Johnson v. *Christian*, 125 U.S. 642, at 646.
Eichel v. *U.S. Fidelity &c. Co.*, 245 U.S. 102, at 104.

A proceeding which is designed to regulate, control and enforce or restrain the decrees of an original action and to further deal with the administration of a matter within the control of the Court, to the end that more complete justice might be accomplished and in order to prevent said decrees from working injustice and creating an inequitable advantage, is an ancillary proceeding, dependent upon the original action.

Minnesota Co. v. *St. Paul Co.*, 2 Wall. 609, at 633 and 634.
Campbell v. *Golden Cycle Mining Co.*, 141 Fed. 610, at 612.
Venner v. *Penn. Steel Co.*, 250 Fed. 292, at 296 and 297.
Dickey v. *Turner*, 49 Fed. (2d) 998, at 1000.

Any proceeding for the above purpose, whether it be a bill or petition or just a simple motion, is an ancillary proceeding.

Venner v. *Penn Steel Co., supra,* at 296 and 297.
Dickey v. *Turner, supra,* at 1000.

The receiver's motion is therefore not an original cause of action, but is dependent on and supplemental to the receivership and the respondent's petition to be allowed to sue. The District Court is administering the assets of The Stores in receivership, and as a part of this administration it gave the respondent permission to sue on the bond in question. This bond is in the possession of the Court and its obligation is in the Court's control. The receiver's motion was designed merely to further deal with the administration of this matter, to aid, regulate and control the liquidation of the receivership in order to effect the intention of the Court and prevent injustice and the working of an inequitable advantage. It merely seeks to modify a previous administrative order of the Court.

In such an ancillary proceeding the Court may proceed without actual service of the subpoena on the defendant if he lives outside the territorial jurisdiction of the Court. Service may be made upon his counsel in the original action and the Court may issue an injunction without actual personal service.

Dunn v. *Clarke,* 8 Pet. 1, at 2.
Minnesota Co. v. *St. Paul Co., supra,* at 633.
Leman, Adm., v. *Krentler-Arnold Hinge Last Co.,* 284 U.S. 448.
Crelin v. *Ely,* 13 Fed. 420, at 422.
Bartlett v. *Sultan of Turkey,* 19 Fed. 346.
Abraham v. *North German Fire Insurance Co.,* 37 Fed. 731.

All that is requisite is that the defendant in the ancillary matter should have notice of the institution of such proceeding, and service on his chosen attorney in the original proceeding is therefore proper. This practice existed before Equity Rule 13 was in effect and has never been understood to be affected thereby. The practical construction of this rule has always been not to extend it to subpoenas on ancillary proceedings.

The Cortes Co. v. *Thannhauser,* 9 Fed. 226.

The service of the order of notice on the receiver's motion was made on Mr. Horblit, counsel for the respondent in the original proceeding, and pursuant thereto the respondent appeared in the District Court on the return day. Certainly, then, in view of the above authorities and the fact that the respondent was represented in the proceeding, it cannot be said that the service on his attorney was in error.

The respondent has argued that this service was in error because the order of notice provided for service on "him" (Louis Raphael). Your petitioner contends on the other hand, that the service on Raphael's attorney complied with the order because the respondent was a resident of Connecticut.

Abraham v. *North German Fire Insurance Co., supra.*

As a matter of substance the respondent is not prejudiced or injured in any way by service on Mr. Horblit. Such service was in fact more nearly calculated to notify the respondent. If this Honorable Court, however, does not think that this service complied with the order of notice and thinks that this service is fatal to proper jurisdiction, your petitioner prays that the order of notice be amended to provide specifically for service on Mr. Horblit, the respondent's counsel.

Jurisdiction in this matter, however, is not dependent on the doctrine of ancillary proceedings and substituted service, for the general appearance of the respondent, Raphael, on the receiver's motion to amend, has subjected him to the jurisdiction of the District Court.

VIII.

Conclusion.

The District Court did not err in issuing the order of December 7, 1931 (R. 59-60), by which it modified its previous order of March 23, 1931, giving the respondent, Raphael, leave to sue on the bond, and by which it enjoined said Raphael from prosecuting the suit on the bond which he had instituted in the Massachusetts Court pursuant to said leave, except that he may proceed to judgment, but no further.

The decree of the Circuit Court of Appeals on December 7, 1931, reversing and remanding said order of the District Court, should be reversed.

Respectfully submitted,

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